Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NORTH AVENUE NOVELTIES, INC.,
an Illinois Corporation,

Petitioner,

VS.

CITY OF CHICAGO,
an Illinois Municipal Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 16, 1996

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QUESTIONS PRESENTED

Whether the Court of Appeals erred in concluding that Chicago's adult use zoning provisions are not unconstitutionally overrestrictive because it improperly assessed the impact of the existing, improperly located adult uses, which are not entitled to continue at their present locations as lawful prior nonconforming uses, and because it misapprehended the uncontradicted evidence concerning the number of actual sites available to adult uses?

PARTIES

The Plaintiffs in the District Court were North Avenue Novelties, Inc. and its President, Harold Gerstein. North Avenue Novelties, Inc. is incorporated under the laws of the State of Illinois and has its principal place of business at Chicago, Illinois. It has no parent or subsidiary corporations. The original Defendants were the City of Chicago and its Mayor, Richard M. Daley, sued in his official capacity only. The District Court dismissed Mayor Daley as a redundant defendant, and North Avenue Novelties, Inc. has not challenged and does not challenge that dismissal. Harold Gerstein no longer serves as North Avenue Novelties' President, and he did not pursue his appeal below. He is not a party here.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

North Avenue Novelties, Inc. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 88 F.3d 441 (7th Cir. 1996) and is reprinted in the appendix to this Petition at page 3a.

The opinions and orders of the United States District Court for the Northern District of Illinois have not been reported but are reprinted in the appendix to this petition beginning at page 12a.

JURISDICTION

The District Court had federal question jurisdiction over North Avenue's claims pursuant to Sections 1331 and 1343(a)(3) of Title 28 of the United States Code because North Avenue challenged the validity of the City's adult use zoning provisions under the First Amendment to the United States Constitution as applied to the City by the Fourteenth Amendment thereto. *See infra* at 13a, 25a. The District Court also had supplemental jurisdiction over the City's counterclaims pursuant to Section 1367 of Title 28 of the United States Code because the City's counterclaims for relief under the challenged provisions were so related to North Avenue's challenges that they formed part of the same case or controversy within the meaning of Article III of the United States Constitution. *Id.* at 14a.

The District Court initially decided to enter a summary judgment in favor of the City, and such a judgment was entered on November 22, 1995. *See infra* at 25a. On November 29, 1995, however, North Avenue filed a motion under Rule 59 to set that judgment aside. The District Court granted that motion on January 19, 1995, and this case was reinstated. *Ibid.* The case was subsequently tried to the District Court during April, 1995. After taking the matter under advisement, the District Court entered its final judgment on June 19, 1995. *See infra* at 12a.

While North Avenue filed two motions to stay portions of the judgment pending appeal, and while the trial court

stayed enforcement of its final judgment until June 26, 1995 in order to permit North Avenue time to seek a stay from the Court of Appeals, North Avenue did not file any motion for a new trial or any other motion which would have effectively tolled the time within which to appeal. North Avenue and Harold Gerstein, the other plaintiff below, filed their notice of appeal with the Clerk of the District Court on June 20, 1995.

The Court of Appeals had jurisdiction over this appeal pursuant to Section 1291 of Title 28 of the United States Code because North Avenue sought review of a final decision and judgment of the United States District Court for the Northern District of Illinois which disposed of all of the claims and counterclaims with respect to all of the parties below. Harold Gerstein, who had been one of the plaintiffs before the District Court, abandoned his appeal while this matter was pending before the Court of Appeals, and that court dismissed his appeal prior to oral argument in that court. In due course, the Court of Appeals considered North Avenue's appeal, and it affirmed the District Court's judgment on July 1, 1996. *Infra* at 3a. On July 15, 1996, North Avenue filed a timely petition for rehearing, which the Court of Appeals finally denied on July 18, 1996. *See infra* at 1a.

This Court has jurisdiction to review the final judgment of the Court of Appeals under Section 1254(1) of Title 28 of the United States Code. North Avenue has neither sought nor obtained any extension of time in which to file this petition.

ORDINANCES INVOLVED

The adult use zoning provisions which North Avenue challenged below are codified in Sections 3.2, 9.3-2, and 9.3-3 of the Municipal Code of the City of Chicago. These provisions are reprinted in the appendix to this petition beginning at 32a.

STATEMENT OF THE CASE

Proceedings Below.

North Avenue Novelties, Inc. ("North Avenue") and its President, Harold Gerstein, filed this action in the United States District Court for the Northern District of Illinois on October 21, 1992 seeking declaratory and injunctive relief against the City of Chicago ("City") and its mayor[1] on the grounds that the so-called "adult use" zoning provisions promulgated by the City, *cf. infra* at 32a, were impermissibly overrestrictive in violation of the First and Fourteenth Amendments to the United States Constitution and Sections 2 and 4 of Article 1 of the Illinois Constitution of 1970. *See infra* at 17a. North Avenue presented its overrestrictiveness challenge as facial attack upon the City's adult use zoning provisions, asserting that the collective effect of the locational regulations which they imposed was to unreasonably interfere with the constitu-

[1]Mayor Richard M. Daley was sued in his official capacity only. On May 19, 1993, the District Court dismissed him as a redundant party defendant. North Avenue did not appeal from that dismissal and does not challenge it here.

tionally protected expression which adult uses disseminate. *Id.* at 6a, 18a.

On December 22, 1992, the City moved to dismiss North Avenue's complaint, arguing that North Avenue lacked standing to challenge the adult use zoning provisions because another City ordinance would prohibit North Avenue's operation at its chosen location even if the constitutional challenge were to succeed in invalidating the adult use zoning provisions. The City claimed that its Planned Manufacturing District ("PMD") ordinance prevented the operation of any bookstore on North Avenue's premises entirely independently of all of the zoning ordinance provisions which North Avenue challenged. *See infra* at 14a. Beyond this, the City also claimed that, as a matter of law, its adult use zoning provisions provided reasonable, content-neutral, time, place and manner restrictions which properly served a substantial governmental interest and which offered ample alternative avenues of communication. The District Court denied the City's motion in all substantive respects.

Thereafter, the City counterclaimed, assuming the validity of the challenged provisions and the independence of the PMD ordinance, seeking a permanent injunction restraining North Avenue from operating its adult bookstore at its chosen location and seeking retrospective sanctions for North Avenue's operation of that bookstore prior to and during the pendency of the litigation below. *Ibid.* The parties undertook discovery and the case proceeded towards trial, but on September 20, 1994, the City moved for summary judgment on North Avenue's complaint and counts I-IV of the City's counterclaim, principally raising claims identical to those which it had raised in its motion to dismiss. This time, however, the District Court determined that it did not have subject matter jurisdiction to

decide the claims asserted in North Avenue's complaint because North Avenue lacked standing after all. The court declined to consider North Avenue's overrestrictiveness challenge because it agreed with the City that the PMD provisions independently prohibited North Avenue's operation at its current location. *See infra* at 25a. Thus on November 14, 1994, the District Court entered an order granting the City's motion for summary judgment. Because of an unresolved issue concerning the appropriate amount of retrospective sanctions, however, the District Court did not enter judgment on that order until November 22, 1994. On November 29, 1994, North Avenue filed a timely motion for reconsideration, which the District Court granted on January 19, 1995, determining that certain factual issues surrounding the PMD ordinance required trial after all. *Ibid.*

The District Court thus reinstated this case, and conducted a three-day trial on the merits in April, 1995. It thereafter rejected North Avenue's overrestrictiveness challenge and upheld the constitutionality of the challenged provisions. *See infra* at 29a-31a. It held that the City's ordinances were not so overly restrictive as to violate the First Amendment to the United States Constitution, *Id.* at 30a, and it reinstated its earlier conclusion that North Avenue lacked standing because of independent prohibitions found in the PMD ordinance. *Id.* at 26a. On June 19, 1995, the trial court entered a permanent injunction restraining North Avenue from operating its bookstore at its location, *see infra* at 16a, and imposed certain retrospective sanctions, *Id.* at 12a. Also on June 19, the trial court denied North Avenue's requests for a further stay pending appeal under Rule 62(c) of the Federal Rules of Civil Procedure, but stayed its permanent injunction for a period of one week in order to permit North Avenue to seek temporary relief in the Court of Appeals. North Avenue filed its

Notice of Appeal and Jurisdictional Statement in this matter on June 20, 1995.

On July 11, 1995, the Court of Appeals denied North Avenue's motion for a stay and injunction pending appeal. North Avenue subsequently applied to Circuit Justice Stevens for a stay of the trial court's injunction pending the proceedings on appeal, but Justice Stevens denied that application on July 19, 1996.

Factual Background.

Prior to and during the proceedings in the District Court, North Avenue owned and operated a bookstore located at 1308 West North Avenue in Chicago from which it disseminated to adult members of the public who agreed to view or receive it sexually explicit but nonobscene expression in the form of books, magazines, motion pictures, and videotapes. Because of the character and amount of sexually oriented expression which North Avenue disseminated, its bookstore qualified as an "adult use," within the meaning of Section 17-3.2 of the Chicago Municipal Code, *cf.* infra at 32a. For this reason, the challenged provisions restricted North Avenue's bookstore to zoning districts designated C2 and C3 by the Chicago Zoning Ordinance and its associated zoning maps. They further required that, even within such zoning districts, North Avenue could locate only on lots which were, as measured between property lines, more than 1000 feet from (a) any other existing adult use, (b) and zoning district zoned for residential use, and (c) any pre-existing "school or place of worship." Depending upon just how the terms "school" and "place of worship" were defined, the challenged provisions left between 273 and 549 acres of land -- far less than one percent of the City's overall area -- available for adult uses. *See infra* at 21a-22a. The requirement that adult uses separate from one another by

at least 1000 feet imposed a "theoretical upper limit" of between 22 and 56 on the number of adult uses which could simultaneously locate within these available areas, *Id.* at 21a, and at the time North Avenue established its operation, "the City's zoning ordinance did provide for an unknown number of sites, described as 'numerous,' which were available to locate an adult use." *Id.* at 24a.[2]

Shortly after North Avenue opened its bookstore, two other adult uses had located on lots which complied with the challenged provisions, *see infra* at 24a, and the record discloses no instance in which a person who was seeking to locate an adult use was actually unable to find a legal location during the period at issue here, *Id.* at 10a. Nevertheless, North Avenue did not locate its bookstore within a C2 or C3 zoning district, *Id.* at 4a-5a, and although it was more than 1000 feet from the nearest school, place or worship, or other adult use, North Avenue admitted that it was located approximately 825 feet from the nearest zoning district zoned for residential use. *Ibid.* All of the land in that residential zoning district which was within 1000 feet of the bookstore, however, was occupied by the John F. Kennedy Expressway and all of the land in that zoning district which was actually in residential use was located across the expressway and more than 1000 feet from the bookstore. Because North Avenue believed that the challenged provisions were unconstitutional and void, it had deliberately chosen to locate its bookstore without regard to them, in

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[2]At the same time, 35 stores which obviously qualified as adult uses and more than 50 video stores which might so qualify, depending upon how the definition of "adult bookstore" was read, *cf. infra* at 32a ("separate section or segment devoted to the sale or display of [adult] material")), were located in the City outside of the required C2 and C3 zones. *Infra* at 22a.

the process bypassing numerous sites in C2 and C3 zones which appeared to be available for adult uses. *Id.* at 23a.

North Avenue's bookstore is, in fact, located in subdistrict 2 of Planned Manufacturing District No. 2, which is known as the "Elston Corridor PMD." *Id.* at 19a-20a. The City establishes PMDs in order to preserve its prime industrial areas so that Chicago may compete for manufacturing uses with the industrial parks of suburbia. *Id.* at 19a. The ordinances governing the PMDs generally provide for certain industrial uses and certain specified non-industrial and commercial uses felt to be accessory to industrial uses. *Ibid.* Despite its presence within the Elston Corridor PMD, however, subdistrict 2 is governed by the zoning regulations which apply to an ordinary M1-3 Restricted Manufacturing District. *Id.* at 20a. While this does not permit a bookstore, a variety store, or an indoor amusement establishment to locate in subdistrict 2, *infra* at 24a. it does permit 22 uses, many of which are distinctly commercial in nature, *see infra* at 20a (banks, barber shops, currency exchanges, drug and food stores, recreation buildings, private clubs, liquor stores, taverns, and offices)), though of light intensity, non-obstructive, and service or convenience-oriented, *Id.* at 19a-20a.

Under the foregoing circumstances, the trial court determined that the City's adult use zoning provisions provide sufficient sites for adult uses within the City to withstand constitutional challenge and that, even if they do not, the applicable PMD ordinance would nevertheless prohibit North Avenue's operation of its bookstore. *Id.* at 25a-31a.

The Court of Appeals reversed the District Court's determination that the PMD ordinance imposed an independent prohibition upon North Avenue which deprived it of standing to challenge the adult use zoning provisions.

The court recognized that, although North Avenue did not challenge the municipal interests underlying the PMD ordinance, it challenged that ordinance insofar as it contributed to the locational limitations which the City imposed upon adult uses.

> [North Avenue] challenges Chicago's overall scheme of limiting adult uses to certain specified areas. In essence, this is a facial attack on the ordinance because [North Avenue] alleges that it unconstitutionally limits the total amount of sexually explicit speech. In making this challenge, [North Avenue] necessarily contends that the PMD provisions contribute to the overall speech restriction.

Infra at 6a-7a. The Court of Appeals nevertheless affirmed the District Court's judgment because it concluded that the challenged provisions provide adult uses with a "reasonable opportunity" to open and operate in Chicago. It took as "relevant evidence" supporting this conclusion the facts that there are currently 35 adult uses operating in Chicago and that North Avenue's expert witness testified, as the court understood him, that "between 22 and 56 locations (depending upon precisely where adult uses would actually open) are available for new adult uses." *Id.* at 10a.

North Avenue petitioned the Court of Appeals for a rehearing on two narrow grounds. First North Avenue argued that the court had improperly ignored the legal ramifications of the record evidence that the existing uses do not, in fact, qualify as lawful preexisting nonconforming uses under the City's zoning ordinance. For this reason they can be required to move to the available lawful sites, and they thus cannot properly be counted in addition to those sites as the court suggested. In this sense, the existing adult uses weigh *against* the Court of Appeal's

conclusion that ample alternative sites are available in Chicago rather than for it. Second, North Avenue contended that the Court of Appeals misapprehended the testimony offered by North Avenue's expert witness at trial. North Avenue observed that while its witness testified that between 22 and 56 *geometric points* could be placed on a map in a way that satisfied the relevant locational requirements, he also testified that fewer than 22 *actual sites* could, in fact, be so placed. *See infra* at 40a, 51a. Since this number is less than the number of existing uses which can be compelled to relocate, North Avenue asserted that the record demonstrates that the challenged provisions are indeed overrestrictive. The Court of Appeals denied North Avenue's petition for rehearing on July 18, 1996. *Infra* at 2a.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Erred in Concluding that Chicago's Adult Use Zoning Provisions Are Not Unconstitutionally Overrestrictive Because It Improperly Assessed the Impact of the Existing Adult Uses and Because It Misapprehended the Uncontradicted Evidence Concerning the Number of Actual Sites Available to Adult Uses.

In assessing North Avenue's overrestrictiveness challenge to the City's adult use zoning provisions, the Court of Appeals correctly characterized that challenge as a facial First Amendment challenge which legitimately reaches all of the City's zoning-related regulations insofar as they contribute to the locational restrictions which are imposed upon adult uses in Chicago. *See infra* at 6a-7a. It also correctly determined that the City bears the ultimate burden of justifying the challenged provisions under the

First Amendment, *Id.* at 7a,[3] by showing that they leave a sufficient number of sites open to adult uses "as a group" to insure that the "public as a whole" continues to have reasonable access to the presumptively protected expression which adult uses disseminate. *Id.* at 8a, citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62, 76 (1976).

The Court of Appeals seriously erred, however, in two narrow but critical respects. First, it improperly assessed the legal effect of the existing but improperly located adult uses in a context, presented here, where the City is not prepared to say that those existing uses are entitled to continue at their present locations as lawful prior nonconforming uses. Second, the Court of Appeals misapprehended the uncontradicted evidence concerning the number of actual sites which are simultaneously available to adult uses in Chicago under the challenged provisions. Since the number of such sites is *lower* than the number of presently existing adult uses which the City could require to relocate at any time, the proper legal effect of these existing adult uses is to establish that the challenged adult use zoning regulation are, in fact, unconstitutionally overrestrictive as North Avenue contends. North Avenue addresses each of these errors in turn.

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[3]*See also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), in which this Court expressly recited *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-54 (1986), as one of several examples of cases in which the government properly bears the burden of justifying restrictions on presumptively protected expression.

A. Since the 35 Adult Uses Existing in Chicago Are Unlawfully Located in the City's View, and Since the City Has Not Conceded Their Right to Operate, Their Presence Establishes on this Record the Minimum Level of Legally Unmet Demand for the Expression Disseminated by Adult Uses.

In concluding that the challenged adult use zoning provisions "provide[] sufficient alternate channels of communication for sexually explicit materials," the Court of Appeals expressly considered the fact, stipulated by the parties below, that "[t]here are currently 35 adult uses within Chicago's city limits." *See infra* at 10a. This fact would indeed go a long way toward helping the City to bear its burden of justifying the challenged adult use zoning provisions were it not for some additional related facts which the Court of Appeals left unmentioned and which it may have overlooked entirely.

The present record does *not* establish that the 35 adult uses which existed when North Avenue opened its store in 1992 are located on sites which are or were legally available to adult uses under any version of the City's adult use zoning provisions. The record reflects that these uses were established before the City had promulgated any adult use zoning provisions, and that they had, in fact, located on sites which became *un*available to adult uses under the challenged provisions. Thus it is not true that 35 adult uses have managed to find lawful sites under Chicago's adult use zoning regulations. Indeed, even the City has never argued that more than two of the currently existing adult uses managed to find proper sites under its ordinance provisions, and both of these opened after North Avenue began operating its store. *See infra* at 24a. At the time North Avenue opened its store, in fact, there were no lawfully located existing adult uses anywhere in Chicago;

and even by the time of the trial in this case all but two of the City's existing adult uses remained unlawfully located. *See Ibid.* (the two lawfully located existing adult uses were established in 1993). Thus all of the adult uses serving the demand for sexually explicit fare in Chicago in 1992 were, like North Avenue's store, illegally located in the City's view. This cannot show that the challenged adult use provisions provide for ample alternate channels of communication.[4] On the contrary, the fact that no existing adult uses were operating on lawful sites in 1992 strongly suggests just the opposite.

At one point, the District Court correctly noted that the challenged provisions do not require that the 35 preexisting adult uses shut down or move if they qualify as prior nonconforming uses. *See infra* at 22a. It could not properly suggest, however, that this observation supports the challenged ordinance provisions on this record because the parties expressly stipulated below that the City is unable to say that any of the 35 improperly located existing adult uses were ever operating as lawful prior nonconforming uses. (R. 135-7 at 346). Thus for all this record shows, the City could begin an enforcement campaign to close all 35 of them down the day after the final mandate issues in this case. This is precisely why *Morscott, Inc. v. City of Cleveland*, 781 F. Supp. 500, 505-506 (N.D. Ohio 1990), properly held that a municipality may not rely upon the presence of existing adult uses in defending against an overrestrictiveness challenge unless it establishes that there are existing adult uses which are *legally entitled* to continue operating as lawful prior nonconforming uses. This inherently plausible holding makes especially strong sense in light of

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[4]The City can hardly justify an artificially low limit on lawful adult use sites on the grounds that sexually explicit fare is, in fact, available at unlawful locations.

this Court's admonition that, where the regulation of presumptively protected expression is concerned, the courts may not rely upon statements or assumptions about municipal good faith to rescue otherwise unconstitutional ordinances. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988). Yet that is all the City could offer here in the absence of any showing that the 35 existing adult uses are for some reason legally entitled to continue their operation. The City had every opportunity to make such a showing below, but it repeatedly refused to do so.

In light of these additional record facts, the existence of the 35 adult uses to which the Court of Appeals referred, *infra* at 10a, does bear upon the Court of Appeal's ultimate conclusion in this matter at least as strongly as the court's opinion suggests, but in exactly the opposite direction. Since the City has never even suggested that it will not move against the 35 improperly located adult uses -- and since nothing but its good faith would support any such suggestion even if it were made -- none of these uses can count in favor of available alternate channels under the challenged ordinance provisions. *Cf. Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). On the contrary, since each of these existing uses is currently serving a real demand for the expression disseminated by adult uses, they in fact count *against* the validity of the challenged ordinance in the same way that the existing nonconforming adult uses properly cut against the validity of the Los Angeles adult use zoning ordinance. See *Topanga Press, Inc v. City of Los Angeles*, 989 F.2d 1524, 1533 (9th Cir. 1993). Since the City might require that 35 of the existing uses relocate at its whim, it must show that at least 35 relocation sites are available for them in order to justify its regulation. Even apart from an express "reloca-

tion" analysis, the presence of 35 unlawfully located adult uses at the very least establishes the absolute minimum level of legally unmet demand in Chicago for the expression disseminated by adult uses. Indeed, the actual demand is very likely to be substantially higher than that since the fact that all of the adult uses existing in 1992 had been operating for years without any legal assurance that they could continue to do so has undoubtedly had a substantial chilling effect upon the willingness of other adult uses to open and operate under similar conditions.[5]

B. Professor Thomas Testified Without Contradiction that Less than 22 Actual Sites Would be Simultaneously Available in Chicago Using Even the Narrowest Definitions of "School" and "Place" of Worship." This Number Is Too Low Even to Serve the Minimum Legally Unmet Demand Established by this Record.

Given the establishment on this record of the foregoing minimum level of demand, the Court of Appeals misunderstood the ultimate thrust of North Avenue's factual argument when it remarked that "Novelties' entire argument

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[5]The same "chilling effect" consideration also reverses the thrust of the fact, noted by the Court of Appeals, *infra* at 10a, that the City's zoning administrator receives only 4 or 5 inquiries per year concerning prospective adult uses. Since the City points to only two uses which ever managed to find lawful sites under any version of its adult use zoning provisions (and even those were established after North Avenue opened its store), the low number of such inquiries may well amount to but another reflection of North Avenue's very point: the challenged provisions make so few locations lawfully available to adult uses that few are willing to bother even attempting to open to serve the existing demand.

rests upon comparing Thomas' figures with the figures relating to the ordinances at issue in other adult use zoning cases." *See infra* at 9a. North Avenue offered those comparisons to show just how poorly the City had provided for adult uses compared with other municipalities. The ultimate thrust of North Avenue's factual argument, however, was and is that the City has simply not provided enough simultaneously available locations to meet the local demand established by the record.

As noted at 12-16, *supra*, the absolute minimum legally unmet demand is established by the number of existing unlawfully located adult uses. The other side of the relevant comparison involves the number of available sites under the challenged provisions. Here too, North Avenue submits that the Court of Appeals misapprehended important facts of record. In the first place, the parties' experts did not substantially disagree over the amount of land which is available in Chicago based upon the City's narrow definition "school" and "place of worship." *Cf. Infra* at 9a. Under that narrowest definition, Thomas found 548.8 acres available and Smith found 532 acres available to adult uses. *Infra* at 20a-22a. Smith's raw figure is actually slightly lower than Thomas' because Smith, one of the City's planning officials, had some unpublished information available to him which Thomas did not use. *Id.* at 22a. Both Thomas and Smith thus arrived at a figure which constitutes well under four-tenths of one percent of the City's total area. To be sure, Smith made his percentage figures appear higher than Thomas' by dividing the area available to adult uses by less than the total land area of the City.[6] On cross examination, however, Smith readily

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[6]Smith calculated his one percent figure by excluding all park, residential, and transportation land from his comparison figure. He reached his three percent figure by excluding from the

admitted doing so, and he gave his reasons for using his chosen denominators. He admitted, however, as North Avenue has previously warned, that his percentage figures could not be compared with Thomas' percentages or with those reported in such cases as *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Thomas' .375 of one percent figure -- and the very similar percentage figure readily calculated from Smith's 532 acre finding and the total area of the City of Chicago -- *can* be so compared. Thus Smith's one to three percent figures, referenced by the Court of Appeals, *infra* at 9a, differed from Thomas' .375 of one percent figure not because of a difference in the actual area found available to adult uses but because of differences in the denominators each chose to use. See note 6, *supra*. Only Thomas compared his figures to the total municipal land area as had the *Renton* Court in reciting the five percent figure shown by the record in that case.

Thus, despite a possible contrary implication in the Court of Appeal's opinion, *infra* at 9a, both Thomas and Smith evaluated the land area available to adult uses under the narrowest definition of "school" and "place of worship," and each came to raw numbers which were very similar to one another.[7] In two important respects, however, Thomas'

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comparison figure all of the City's land except that identified as "commercial and service property": shopping malls, commercial and retail areas, business parks, office buildings, mixed use areas, cultural and entertainment uses, hotels and motels, and strip malls.

[7]During the trial below, the City admitted to the existence of one more place of worship than it had contended for when the pretrial stipulations were completed, and Smith was able to conclude that as a result of that additional place of worship, his raw 532 acre figure for available land would have to be reduced by 16 acres representing virtually all of the land which he had be-

analysis went much further than Smith's. First, Thomas analyzed the land area available to adult uses using not one but three lists of "schools" and "places of worship." Thomas' list 1 was identical to the list used by Smith, and it represented the list upon which the parties were able to agree prior to trial. *See infra* 39a-51a. Thomas' list 2 was identical to list 1 except that it included the I Am Reading Room/Temple, which, during the trial below, the parties eventually stipulated is a church, *infra* at 21a n. 2. Only Thomas' list 3 contained substantially more "schools" and "places of worship" than the City admits qualify under those ordinance terms. In large part but not entirely, the additional "schools" were postsecondary institutions and the additional "places of worship" involved religiously-oriented operations which the City characterized as drug and alcohol rehabilitation missions. *Id.* at 21a. The Court of Appeals correctly noted that, using list 3, Thomas concluded that only 273.3 acres, representing less than two-tenths of one percent of the City's total land area, were available for adult uses. *Infra* at 9a. Thomas did not, however, rely exclusively upon this lower value in carrying out his geometrical packing analysis.

Thomas' packing analysis represents the second important way in which his analysis went beyond Smith's. On this matter too, North Avenue respectfully submits that the Court of Appeals misapprehended Thomas' relevant testimony in two critical respects. That court properly noted that Thomas undertook a "packing analysis" in order to determine an upper limit on the number of adult uses which could locate in Chicago consistently with the requirement that they separate from one another by at least 1000 feet. *Infra* at 8a-9a. It also properly understood that since the theoretical maximum depends upon just how the adult

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lieved available to adult uses in the Loop.

uses -- or the geometrical points which Thomas used to represent them on a map -- fill in the available areas, Thomas necessarily reported ranges of maximum values. *Ibid.* Thomas reported such ranges for the areas which resulted from using each of the three lists described in the previous paragraph. See infra 39a-51a. The range of 22 to 56 possible points, cited by this Court, was derived using the 548.8 acres resulting from the narrowest definition of "school" and "place of worship," not from Thomas' lower 273.3 acre figure which this Court recited. *Id.* at 45a.

Even beyond this, it is critically important to recognize exactly what the cited range represents. Thomas carefully noted on direct examination that he had derived this range from a geometrical analysis which treated each adult use as a geometric point and which treated as appropriate any location within a map area available to adult uses. *Infra* at 39a-51a. He expressly testified that this analysis made at least two simplifying assumptions. First, it ignored the non-zero length and width of the actual physical lots occupied by residential uses, places of worship, schools, and hypothetical adult uses -- effectively measuring the required 1000-foot separations from the centers of the hypothetical lots rather than from actual lot lines as expressly required by the challenged ordinance provisions. *Ibid.* Second, it ignored the need under the Chicago zoning ordinance for street access for each use -- permitting location of a hypothetical adult use on a partial lot or in the middle of an existing street. *Ibid.* In evaluating Thomas' point-packing results, this Court[8] must take these simplifying assumptions

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[8]Heightened appellate factual review is appropriate in this case, since the challenged ordinance provisions regulate expression in a manner which gives rise to fact-sensitive questions. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984).

into account. Thomas testified to the enormous difficulty in performing a packing analysis on actual lots rather than upon geometric points, but he was certain and unequivocal about the result of such analyses: the number of actual lots is lower even than the lowest number of packed points! Id. at 40a, 51a. Referring to the number 22 appearing at the bottom right-hand corner of the first page of Plaintiff's Exhibit 4, Professor Thomas testified as follows:

> Q. Now again, even this Count 4 number, is that the number -- sticking within the realm of theoretical points -- is that the number you would expect to be the lowest of all the counts?
>
> A. Within the theoretical concepts, yes.
>
> Q Now even this number, how might that relate to actual adult uses on actual land?
>
> A. It's got to be high.

Infra at 51a. Thus Thomas testified without contradiction that even the low end of the theoretical range recited by the courts below was higher than the number of actual adult uses which could simultaneously locate in Chicago. Even using the narrowest definition of "school" and "place of worship," Thomas found that, while perhaps as many as 56 geometric points could be packed onto the 548.8 available acres, less than 22 actual lots were simultaneously available to adult uses on that same area.

Since the City offered nothing to contradict Thomas' repeated and unequivocal testimony on this point, and since the trial court expressed no reason to doubt it, the present record thus establishes that less than 22 adult use sites are simultaneously available for location by adult uses in

Chicago.[9] On this record, then, North Avenue's factual argument is simply that the 22 actual lots which, under the most optimistic conditions, would be available for adult uses are too few to serve the legally unmet need in Chicago as minimally established by the 35 illegally zoned operating adult uses. North Avenue has no quarrel with the general law which the Court of Appeals articulated to govern challenges such as the one it brings here; but under that law, the present record demonstrates that the challenged adult use zoning provisions unconstitutionally failed to provide sufficient alternate channels for the presumptively protected expression which adult uses disseminate.

C. The Court of Appeal's Analysis of the Existing Adult Uses in this Case conflicts with that of Two Other Federal Courts of Appeals.

In its disposition of this case, the United States Court of Appeals for the Seventh Circuit departed from the analysis applied by the Fifth and the Ninth Circuits when assessing overrestrictiveness challenged to adult use zoning provisions. Both of those courts have plainly recognized that where there are existing improperly zoned adult uses which are not spared the need to relocate, the number of such uses serves to specify the minimum number of required sites. *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995); *Topanga Press, Inc v. City of Los Angeles*, 989 F.2d

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[9]This record says nothing, of course, about how many actual lots are in fact available to adult uses on commercially reasonable terms. *Cf. Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995); *Topanga Press, Inc v. City of Los Angeles*, 989 F.2d 1524, 1533 (9th Cir. 1993). It says only that, assuming that enough such lots are available, there can never be more than 21 of them devoted to adult uses at any given time.

1524, 1533 (9th Cir. 1993). For this reason, issuance of the writ is particularly appropriate. Sup. Ct. R. 10(a).

CONCLUSION

For all of the foregoing reasons, this Court should direct a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in order to determine the proper effect on a facial First Amendment overrestrictiveness challenge of existing adult uses which are not properly located and which lack a clearly established legal right to continue to operate in their present location as prior nonconforming uses.

Respectfully submitted,

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